(17)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 601

SAMUEL KELLY, PETITIONER,

vs.

W. FRANK SMYTH, AS SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JANUARY 12, 1944.

Judd &

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 601

SAMUEL KELLY, PETITIONER,

vs.

W. FRANK SMYTH, AS SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

INDEX.

	Original	Print
Proceedings in Supreme Court of Appeals of Virginia	1	1
Petition for writ of habeas corpus	1	1
Memorandum in support of petition	4	3
Order dismissing petition	9	5
Clerk's certificate (omitted in printing)	10	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1944.

—9888

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

SAMUEL KELLY, Petitioner,

vs.

W. FRANK SMYTH, as Superintendent of the Virginia State Penitentiary, Respondent

PETITION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

To the Honorable Chief Justice and the Honorable Associate Justices of said court:

Your petitioner, Samuel Kelly, respectfully shows that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by W. Frank Smyth, Superintendent of the Virginia State Penitentiary, at 500 Spring Street, Richmond, Virginia; that the imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to-wit: that the only pretext or cause of such arrest and detention is by virtue of a void mittimus unlawfully and improperly based upon the following facts, to-wit: that on the 15th day of May, 1942, your petitioner was allegedly convicted of grand larceny in the Hustings Court of the City of Richmond, although the record fully shows that there was neither any evidence that your petitioner was ever guilty of any such grand larceny or that there was ever any identification of the goods allegedly taken from the A and B Clothing Store and certain clothing found in possession of your petitioner on the 7th day of March, 1942; that thereafter a writ of error was applied for to the Supreme Court of Appeals of Virginia and said writ was granted; that upon hearing upon said [fol. 2] writ the Supreme Court of Appeals of Virginia on June 8, 1943, affirmed the decision of the lower court; that on June 30, 1943, in accordance with section 6372 of the Code of Virginia, and within the time set by such section, your petitioner filed the requisite number of printed copies of petition for rehearing with the Clerk of the Supreme Court of Appeals of Virginia; that thereafter, and in accordance with section 4930 of the Code of Virginia your

petitioner applied for bail to the honorable judge of the Hustings Court of the City of Richmond, which application was denied, and your petitioner remanded to the City Jail; that subsequently, while your petitioner still had pending his application for a rehearing, and while his cause had not been finally determined, that your petitioner was taken from the City Jail to the State Penitentiary, given a number, and is now illegally confined, detained, imprisoned and restrained of his liberty.

That such illegal imprisonment, detention, confinement, and restraining of his liberty is without any sanction of law, is void, and in violation of section 6372 of the Code of Virginia, of section 4930 of the Code of Virginia, of Article Nine of the Bill of Rights of Virginia, and of the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, your petitioner respectfully prays that a writ of habeas corpus ad subjiciendum may be granted, directed to the said W. Frank Smyth commanding him to have the body of this petitioner before your honorable court, at a time and place therein to be specified, together with the time and cause of this detention, and that your petitioner may be restored to his liberty upon such reasonable bail pending [fol. 3] his petition for rehearing before the Supreme Court of Virginia being heard as may appear reasonable and proper to this honorable court.

And this your petitioner respectfully prayeth, and will ever pray, et cetera.

s./ Samuel Kelley

COMMONWEALTH OF VIRGINIA,
City of Richmond, to-wit:

This day, Samuel Kelly, the above named petitioner, personally appeared before me, William J. Bryan, a Notary Public in and for the city and State aforesaid, in my city aforesaid, and made oath that the matters and things stated in the foregoing petition are true.

Given under my hand in my notarial capacity this 26th day of August, 1943.

s./ William J. Bryan, Notary Public. My commission expires Oct. 21, 1946.

[fol. 4] BRIEF MEMORANDUM SUPPORTING PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

The facts and references to Code sections set forth in sworn petition require very little elaboration. It is the desire, however, of counsel for petitioner, and their respectful prayer that they be allowed to orally argue this, and also to indicate very briefly the importance of this question not only for petitioner but the grave general importance of the questions involved. Summarized briefly, it is the earnest contention of petitioner that section 6372 gives a petition for rehearing as a matter of right, not of grace. That this is regarded as a continuation and extension of the original petition for writ of error, and that there is no final disposition of the cause until said petition for rehearing has either been denied, or has been granted and acted upon. If this be the case then it is respectfully submitted that it is monstrous that petitioner should be confined and deprived of his liberty at the very time that his guilt or innocence has not been finally determined. Petitioner is not requesting that he be summarily discharged but merely that he should be released from the penitentiary while his case is still pending, and should be given an opportunity to provide reasonable bail while said petition for rehearing is still pending. To hold otherwise, we respectfully submit, is to run counter to all the established principles of Anglo-Saxon jurisprudence. Petitioner desires at this time only to quote one authority, which is, however, very decisive. Corpus Juris Secondum, Volume 8, page 75, section 36, says the following:

[fol. 5] "Where on appeal a judgment of conviction has been affirmed, and a petition for rehearing has been made, defendant who is at large on bail will not be remanded to custody, pending such petition unless some unusual reason is shown why he is not likely to remain within the jurisdiction."

In this connection the case cited, which seems to be the only one in which this particular question has come up is that of Walsh v. United States, 174 Fed. 621, 99 C. C. A., 134, and the court in this case says that there is a duty upon the government to show that more than usual grounds exist to believe that the accused will not remain in the

jurisdiction of the court to answer final judgment to the court.

It is earnestly and respectfully submitted to the court that the action of the authorities at the penitentiary in determining the guilt of petitioner at a time when his petition for rehearing is still pending is a usurpation of the powers of the Supreme Court of Appeals of Virginia, and is dangerous not only to your petitioner but to anyone in similar circumstances. If section 6372 has any meaning at all it certainly means that a right is given for rehearing, when the terms are complied with, as they have been in the instant case. To assert that your petitioner, or persons similarly circumstanced, have said right, but are in the meantime to suffer punishment or a part thereof for an accusation of which they may be ultimately cleared, is repugnant to all our sense of justice. Let us suppose what could very easily happen. That your petitioner is granted a rehearing and that upon said rehearing the decision of the lower court is reversed, and upon being remanded to the court, petitioner is acquitted. Petitioner in the meantime would have suffered the stigma of being an inmate of the penitentiary, the pain and humiliation connected therewith, his business would be ruined, and he would have no remedy [fols. 6-8] whatever. The courts would have declared him not guilty and the ancillary penitentiary authorities would have already exacted punishment or a part thereof for a non-existent offense. Counsel for petitioner are loath to believe that such ever was the intent of the legislature or of the framers of our system of jurisprudence. Counsel for petitioner, therefore, respectfully submit that the interest not only of petitioner, but of all citizens, and of justice itself and good practice, require that petitioner should be admitted to bail pending this petition for rehearing, and that he should not be subjected to confinement or detention before the properly designated court, should finally determine that he should be confined.

Respectfully submitted, (S.) E. A. Norrell, Thomas H. Stone, Counsel for Petitioner, Samuel Kelly.

Received Oct. 1, 1943. M. B. Watts, Clerk.

[fols. 9-10] IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER DISMISSING PETITION—October 13, 1943

This day came Samuel Kelly and presented to the court his petition that a writ of habeas corpus ad subjiciendum do forthwith issue, to be directed to W. Frank Smyth, Superintendent of the Virginia State Penitentiary, commanding him to have the body of the said Samuel Kelly, in his custody, as it is said, together with the day and cause of his being taken and detained, before this court; and the court having maturely considered the said petition, is of opinion that the said writ of habeas corpus should not issue as prayed. It is therefore considered that the said petition be dismissed, and that the respondent recover of the petitioner his costs by him expended about his defense herein.

Nos. 600-601

Office - Supreme Court, U. S.
FILED
JAN 12 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL KELLY,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

E. A. NORRELL,
Richmond, Va.

THOMAS H. STONE,
Richmond, Va.

SPOTTSWOOD W. ROBERTSON, III.,
Richmond, Va.

RICHARD W. TOMPKINS,
Washington, D. C.

Lawyers Publishing Company, Richmond, Va.



SUBJECT INDEX

	Page
Summary and short statement of matters involved	2
Questions presented	7
Basis for jurisdistion of the Supreme Court of the United States	7
Reasons relied on for the allowance of the writ	12
Conclusion and prayer	15

TABLE OF CITATIONS

Abbott v. Tocamo Bk. of Com., 175 U.S. 409, 20 Sup. Ct. 153	10
Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240	11
Davis, etc. v. Wechsler, 263 U. S. 22, 44 Sup. Ct. 13	9
Hill v. Smith, 43 Sup. Ct. 219, 260 U.S., 592	9
Railroad Commission of Texas, et al. v. Eastern Texas R.R. Co., et al., 44 Sup. Ct. 237, 264 U. S. 79	8, 14
St. Louis R.R. Co. v. McWhirter, 33 Sup. Ct. 858, 229 U. S. 265	15
Ward v. Love Cy., 253 U. S. 17	9
Walsh v. U. S., 174 Fed. 621, 99 C.C.A. 134	14

CONSTITUTION AND STATUTES

Section 4930, Code of Va.	5
Section 6372, Code of Va.	5, 10
Corpus Juris Secundum, Vol. 36, pp. 173, par. 270	15
Fourteenth Amendment to U. S. Constitution	8, 9
Title 28, Sec. 344(b), Judicial Code	7

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL KELLY,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable Supreme Court of the United States:

Samuel Kelly respectfully petitions this court for the issuance of a writ of certiorari directed to the Supreme Court of Appeals of Virginia to review the final judgment of that court of October 12, 1943, dismissing the petition of said Samuel Kelly for rehearing of a certain affirmance of the sentence of

the Hustings Court of the City of Richmond, said affirmance having been rendered on June 22, 1943; and your petitioner likewise respectfully petitions this court that the prayed for writ of certiorari review the final judgment of the Supreme Court of Appeals of Virginia in dismissing, on October 12, 1943, petition for writ of habeas corpus.

I.

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED

On May 19, 1942, your petitioner was sentenced to three years in the Virginia State Penitentiary, his trial having been held in the Hustings Court of the City of Richmond on May 15, 1942. Your petitioner was indicted for the larceny of clothing amounting to $606.00 from the A & B Clothing store of Richmond. The evidence showed that Samuel Kelly, your petitioner here, had been employed for many years by the Alco store, a corporation, trading as A & B Leader Clothing Store, as an outside salesman, whose duty it was to solicit prospects for the shop, to go out and canvass the public and discover persons who wanted to buy clothing. Kelly, after soliciting a number of prospects would present a list of them to the proper person in the store, select such goods as he had calls for, and said goods would be checked, a record made by the store, and the goods delivered to Kelly, the store retaining the duplicate record and Kelly being given the original receipt

or record. Goods which were not accepted were returned and Kelly given credit for them, and such as were accepted were returned with the contracts, the contracts retained by the store and the goods delivered to the purchaser.

On January 1, 1942, your petitioner opened a little clothing store, and cleaning and pressing shop, just two city blocks from the A & B Clothing Company, his former employer. He stocked his store with merchandise, bought from a Mr. Jacobs of New York, from whom he got invoices or receipts, some from a Chicago concern for which your petitioner exhibited a draft paid as part payment for the merchandise. On March 7, 1942, your petitioner's store was searched for certain articles of clothing therein which were claimed by Mr. A. D. Lapkin to be the property of Alco store, and your petitioner was arrested and subsequently indicted.

Subsequently in the trial that was had on May 15, 1942, there was no identification of any article of clothing other than a purported identification by Mrs. Mathes (T. R. 47-48). We shall refer to this later.

On page 40 of the record in response to a question propounded by the court, "What makes you know from that suit which has no label on it, which you say came from the Famous Clothing Store, to show it came from your place or was ever in your place?" the witness, Lapkin, gave no answer. Nor was he able to identify a single piece of clothing. He based himself upon the contention that labels of the same

wholesaler were found in clothes coming from the A & B Store and from your petitioner's store. On page 41, the court said: "You are guessing he is guilty because he was employed by you rather than some distinctive mark in your clothing." There was no testimony as to any breaking and entry. It was testified that Kelly had no key. And it was testified likewise that Kelly had always checked in and out the clothing for which he was responsible. On page 51 of the record the witness for the Commonwealth, Earl Reader, testified that he had been employed by the A & B Clothing Company seventeen years, that he had never seen Kelly take out anything except what was charged to him with the exception of one suitcase which was used for taking out the clothing. On page 50 the Commonwealth's witness, Miss Banton, testified to the same effect. On pages 48 and 49 the Commonwealth's witness, Mrs. L. D. Moore, testified likewise. We return now to the sole identification or purported evidence of any larceny, that of Mrs. Mathes (T. R. 47-48). Mrs. Mathes made a positive identification of only one item, a light spring coat. In response to cross examination she stated that she did not handle all the sales in the store and that the suit was not sold by her. Significantly enough no questions were asked about this suit of Mr. Lapkin, the manager of the store.

Your petitioner testified in his own behalf, denying the allegation of larceny, and accounting for his possession of the goods in question, exhibiting invoices and a draft through the Federal Reserve Bank of

the City of Richmond for payment of goods in his shop. In addition two witnesses, former employees of the A & B Clothing Company were introduced by the defendant, Mrs. Susan Miles, (T. R. 68-69), who had been employed even after Kelly left the A & B, and Mr. Samuel P. Waddill, Jr., who had been employed for three and one-half years (T. R. 69-70). Both of these witnesses, and Mrs. Miles was credit manager for four years, testified that they had never seen or suspected Kelly of stealing. Reverend J. E. Kennedy (T. R. 70-71) testified that he had known your petitioner for seven years, that his reputation for truth and veracity was good.

Upon the above testimony your petitioner was convicted of larceny and sentenced to serve three years in the state penitentiary! Your petitioner applied for a writ of error to the Supreme Court of Appeals of Virginia, and was granted bail in the amount of $2,000.00 pending disposition by the Virginia Supreme Court of Appeals. Writ of error was granted and the conviction was affirmed by the Supreme Court of Appeals of Virginia on June 12, 1943. Section 6372 of the Code of Virginia (Michie's Annotated Code) provides that petition for rehearing shall be allowed as a matter of right if petition is filed within thirty days from the time of the decision of the Supreme Court of Appeals of Virginia. Your petitioner filed his petition for rehearing on the 30th day of June, 1943, and therefore well within the thirty day period allowed. Section 4930 of the Code of Virginia provides that bail may be given in cer-

tain specified cases and in all other cases. Your petitioner applied for renewal of bail to the Honorable John L. Ingram, Judge of the Hustings Court of the City of Richmond, had his bondsman present, the same bondsman who had previously been accepted by the court; bail was denied, your petitioner's attorneys were not allowed to argue the question, and your petitioner was remanded to the City Jail of Richmond, Virginia. Subsequently and while his petition for rehearing, recognized by Virginia law as part of the original proceeding, was still pending, your petitioner was remanded to the Virginia State Penitentiary to commence serving a sentence. Your petitioner then filed petition for writ of habeas corpus ad subjiciendum with the Supreme Court of Appeals of Virginia, included in the record presented with this petition. On October 13, 1943, both the petition for rehearing and petition for writ of habeas corpus ad subjiciendum were denied. It is significant that in the denial of both the petition for rehearing and petition for writ of habeas corpus the Virginia Supreme Court of Appeals states that it has maturely considered these petitions. The importance of this will become apparent hereafter.

II.
QUESTIONS PRESENTED

For the consideration of this court it is respectfully submitted that the following questions are presented:

1. Does this court have jurisdiction to review?

2. Has your petitioner been deprived of due process of law as set forth in the Fourteenth Amendment to the Constitution of the United States?

3. Has your petitioner been deprived of equal protection of the laws as set forth in the same amendment?

III.
BASIS FOR JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

It is respectfully submitted that under Title 28, section 344(b), Judicial Code, section 237, amended, this court has jurisdiction of this petition for certiorari, such petition being one to review a final judgment and decree by the Supreme Court of Appeals of Virginia, the highest court of that state in which a decision could be had, which judgment and decree dismissed a petition for rehearing, in which petitioner specially set up and claimed that he had been deprived by the Hustings Court of the City of Richmond and by the Supreme Court of Appeals of Virginia of liberty contrary to the due process and equal protection clauses of the Fourteenth Amend-

ment to the Constitution of the United States.

In this connection only one substantial question may arise. That question is succinctly stated: If there be no evidence before a trial court of a crime does the conviction of a person under such circumstances, and the affirmance of conviction by the highest court of the state, contravene the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States? If the answer is in the affirmative, then certainly this court has jurisdiction. That the answer should unqualifiedly be in the affirmative is settled by the following cases decided in this court:

In the case of *Railroad Commission of Texas, et al.* v. *Eastern Texas Railroad Company, et al.*, 44 Sup. Ct. 247, 264 U. S. 79, this court said:

> "Where it becomes necessary to consider whether a state is depriving, or attempting to deprive, a litigant of property without due process of law in violation of the Fourteenth Amendment, and the question turns *on the existence and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms.*" (Petitioner's italics).

It is respectfully submitted that if this court can examine a contract and determine for itself the existence and terms of the contract, in a matter relating to property rights, under the provisions of the Fourteenth Amendment, it certainly can examine the ques-

tion of whether or not your petitioner in the instant cause has been deprived of a still higher right, that of liberty of person, in a criminal cause. If the court can examine and determine the status of one sort of evidence in a civil matter it certainly has a stronger right to examine and determine the status of evidence in a matter affecting the liberty of a citizen.

In this same case this court quoted with approval from *Ward* v. *Love County*, 253 U. S. 17, 22: "The principle is general and necessary" and in this case the court also quoted with approval from *Davis, Director General of Railroads* v. *Wechsler*, 263 U. S. 22, 24; 44 Sup. Ct. 13, 14:

> "If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal *as to what are the facts* alleged to give * * * the right or to bar the assertion of it even upon local grounds." (Petitioner's italics).

In *Hill* v. *Smith*, 43 Sup. Ct. 219, 260 U. S. 592, the question arose as to whether or not the state court had its attention specifically called to the Bankruptcy Act. The court decided that the effect of the Bankruptcy Act can be reviewed, *even though it was not raised at the trial*, where the highest court of the state treated the question as open and decided it. In the instant case specific constitutional rights of your petitioner under the due process and equal protection clauses of the Fourteenth Amendment to the Con-

stitution were set out, practically the whole argument of the petition for rehearing centered around this, and the Supreme Court of Appeals of Virginia, "having maturely considered" the petition rejected it. The same thing is true of the petition for writ of habeas corpus. There can therefore be no question that the federal question was considered by the Supreme Court of Appeals of Virginia specifically. In addition, as decided by the case just cited, there are certain rights which are implicit, and which cannot be disregarded. Certainly no right can be higher than that of proof of guilt beyond reasonable doubt. This is elementary. It was disregarded by the trial court. Petitioner had a right to expect that it would not be disregarded by the Supreme Court of Appeals of Virginia. The first opportunity petitioner had, and the first occasion petitioner had, to assert his federal rights was when the highest state court deprived him of his right. Immediately thereafter petitioner applied to the highest state court for recognition of his federal rights by petition for rehearing, in accordance with the very procedure laid down by section 6372 of the Code of Virginia.

In *Abbott* v. *Tacoma Bank of Commerce,* 175 U. S. 409, 20 Sup. Ct. 153, the question to be decided was whether reputation was property within the meaning of the Fourteenth Amendment, and there was a claim by the petitioner that he had been deprived of property without due process of law. Although the court decided that the petitioner had not been deprived of any constitutional right, it also decided that it had

jurisdiction. On page 413, in considering this question of jurisdiction, this court said:

> "It is true, as suggested by plaintiff in error, that a state may not *by any of its agencies,* legislative, *judicial,* or executive, disregard the prohibitions of that amendment." (Petitioner's italics).

It is respectfully submitted that the true rule is here laid down, and that it of course applies, as said, to the highest court of the state, as well as to a trial court.

In *Coppage* v. *Kansas,* 236 U. S. I, 35 Sup. Ct. 240, which was a case involving the constitutionality of a Kansas law regarding the so-called "yellow dog" contract, this court decided that when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor upon its declared purpose, but rather upon *the operation and effect as applied and enforced by the state.*

And in this case this court also said that it cannot, in the proper performance of its duty, yield its judgment to that of the state court.

If the last two cases be taken and construed together, it is clear that this court has jurisdiction to entertain this petition. In the instant case not only were federal rights implicit in the nature of the cause, but they were also specifically set up upon the first available necessary occasion. This is not a case where petitioner asserts that evidence was improperly received, or that the court decided wrongly on the basis of the evidence.

This is a case where petitioner asserts that he has been completely deprived of his federal rights, by being in prison without any legal evidence whatever of guilt, and in serving a sentence when he should now be out on bail, at the very least.

It is respectfully submitted, on the basis of the above cases, as well as the general principles of law established therein, that this court certainly has jurisdiction to entertain a petition for certiorari. In this connection petitioner specifically set forth these points in his petition for rehearing to the Supreme Court of Appeals of Virginia, and also in his petition for writ of habeas corpus. There can be no question that the Supreme Court of Appeals of Virginia based its denial upon the constitutional questions since the court itself said it had maturely considered the petitions, and the petitions were based almost solely upon constitutional grounds.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The particular facts appearing in this case are somewhat novel, we are glad to say, but the principles are quite clear. It has been so well established, as to need no authority, an accused cannot be convicted except by such proof as excludes any reasonable doubt and negatives every reasonable hypothesis of innocence. A perusal of the entire record conclusively establishes that there was not even a reasonable hypothesis upon

which to base any conviction. There was no breaking and entry. Your petitioner had no key. Everyone testified that he always checked in and checked out properly all goods he was charged with. No one testified as to having seen him taking away any goods with which he was not charged. And the only basis of the decision of the lower court and later of the Supreme Court of Appeals was that recent possession of stolen goods constitutes prima facie evidence of larceny. With this conclusion of law we would certainly not disagree. But both the Hustings Court and Supreme Court of Appeals of Virginia have gone wrong in their decisions, and deprive petitioner of federal constitutional rights, because they have failed to take into account that there never was any identification of the goods found in Kelly's store with the goods alleged to have been taken from the A & B Store. Conviction with any such evidence lacking is clearly such a violation of the rights of your petitioner under the Fourteenth Amendment as to require redress at the hands of this court. That it denies equal protection in that it arbitrarily places your petitioner in a category separate from all other retail merchants can certainly not be contraverted. As pointed out by the Hustings Court itself, by implication (T. R. 40-41) your petitioner cannot be convicted because he had in his store goods which were sold by wholesale dealers all over the country. Your petitioner submits that the record of his trial clearly shows, by an examination of the whole record, that there was absolutely no evidence upon which he could be convicted. Significant in this connection is the unprecedented denial of bail

to your petitioner while his case was pending. Petitioner has not heretofore heard of any case in any Anglo-Saxon jurisdiction in which an accused was required to start serving a sentence before his guilt or innocence had been finally determined. In only one case has anything resembling this come up and that case is the one of *Walsh* v. *United States,* 174 Fed. 621, 99 C. C. A. 134, in which the court said that where on appeal the judgment or conviction has been affirmed, and a petition for rehearing has been made, defendant who is at large on bail will not be remanded to custody pending such petition unless the government shows that more than usual ground exists to believe that the accused will not remain in the jurisdiction of the court to answer final judgment of the court. No such reasons existed in this case, nor has it ever been claimed that any such existed.

Your petitioner is aware that this is a legal petition which, by tradition, should be cold and logical, but the unprecedented violation of constitutional rights makes it very difficult for him to remain in that stoic state. At the very time of this petition, your petitioner is serving a sentence in the Virginia State Penitentiary, has been denied bail, has been convicted on no evidence, or rather upon evidence that clearly showed his innocence.

Petitioner is aware of the fact that this court does not pass upon admissibility or weight of evidence. Petitioner is not basing himself upon such, but upon the fact that no evidence of identification was adduced at his trial. In this connection this court's attention is respectfully called to the cases of *Railroad Com-*

mission of Texas, et al. v. *Eastern Texas Railroad, et al.*, 44 Sup. Ct. 247, 264 U. S. 79; and *St. Louis Railway Company* v. *McWhirter*, 229 U. S. 265, 33 Sup. Ct. 858, wherein it was held that where there was a contention, in an action based on a federal statute, and there was no evidence showing liability thereunder, this court had jurisdiction to review. As pointed out above the distinction is between such cases as concern the weight of the evidence, or the admissibility of the evidence, on the one hand, and the complete absence of legal evidence on the other. In the former cases it is established that this court does not have jurisdiction and may not review; in the latter cases this court does have jurisdiction and should review. In this connection the attention of the court is respectfully called to a helpful compendium in *Corpus Juris Secundum*, Volume 36, page 173, paragraph 270, where this excellent secondary work summarizes as follows:

> "Where a federal question is involved the Supreme Court may review a decision of a state court on a question pertaining to evidence."

V.

CONCLUSION

WHEREFORE, it is respectfully submitted that petitioner in this cause comes properly within the jurisdiction of this court in the instant cause; that there should issue petition for writ of certiorari directed to the Supreme Court of Appeals of Virginia; your petitioner prays that he may have oral argument hereon;

and your petitioner further prays that in accordance with Rule 38, subsection 6 of the Rules of this Court your petitioner may be allowed his liberty upon giving proper and reasonable security, while this petition is pending, and if granted, until final disposition of his cause.

For all of which your petitioner herewith respectfully prays and will ever pray, et cetera.

SAMUEL KELLY,
By Counsel.

E. A. NORRELL,

THOMAS H. STONE,

SPOTTSWOOD W. ROBERTSON, III.,

RICHARD W. TOMPKINS,
Counsel for Petitioner.

E. A. NORRELL,
402½ N. 2nd St.,
Richmond, Va.

THOMAS H. STONE,
22 N. 9th St.,
Richmond, Va.

SPOTTSWOOD W. ROBERTSON, III.,
Consolidated Bank Bldg.,
Richmond, Va.

RICHARD W. TOMPKINS,
1909½ 7th St., N. W.,
Washington, D. C.